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No. 86-749

In The
Supreme Court of the United States
October Term, 1986

BOARD OF TRUSTEES OF
ALABAMA STATE UNIVERSITY,

Petitioner,

v.

ALABAMA STATE BOARD OF EDUCATION; and
WAYNE TEAGUE, STATE SUPERINTENDENT
OF EDUCATION, *et al.,*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT AUBURN UNIVERSITY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Petition for Writ of Certiorari moot?

2. Did the court of appeals correctly hold that a state university has no rights, and therefore, no standing, pursuant to the Fourteenth Amendment to the Constitution of the United States and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*?

3. May the petitioner assert a basis for standing on appeal that was not asserted at trial?

4. Does the petitioner have standing under the *jus tertii* doctrine to raise claims on behalf of its students and faculty?

PARTIES

The petitioner is Alabama State University ("ASU"). The other appellees in the court of appeals, the Knight-Intervenors and the United States, have not filed a Petition for Writ of Certiorari from the court of appeals' decision. The other plaintiff in the district court, Alabama A&M University ("A&M"), was denominated an amicus curiae in the court of appeals.

The Alabama State Board of Education ("ASBE") and Wayne Teague, State Superintendent of Education, were the defendants below to which the petitioner's request for an injunction was directed. Auburn University and its Board of Trustees ("Auburn"), and other defendants in the case in chief, participated to a lesser degree in the proceedings on ASU's request for an injunction and the subsequent appeal.[1]

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[1]The defendants below included the other public institutions of higher education in Alabama: The University of Alabama, Jacksonville State University, the University of North Alabama, Troy State University, the University of South Alabama, Livingston University and the University of Montevallo; the State of Alabama, its Governor, the Alabama Public School and College Authority and the Alabama Commission on Higher Education.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	vi
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. The Petition For Writ Of Certiorari Is Moot	6
II. A State University Has No Rights Under The Equal Protection Clause Or Title VI	8
III. ASU May Not Assert Standing To Raise Claims On Behalf Of Its Students And Faculty For The First Time On Appeal	9
IV. ASU Does Not Have Standing To Assert The Interests Of Its Students And Faculty	12
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

Akron Board of Education v. State Board of Education, 490 F.2d 1285 (6th Cir.), *cert. denied*, 417 U.S. 932 (1974) 12, 13, 14

Alabama State Teachers Association v. Alabama Public School and College Authority, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969) 2

Bender v. Williamsport Area School District, 475 U.S. —, 89 L.Ed.2d 501, 106 S. Ct. — (1986) 9, 10

Board of Education v. Allen, 392 U.S. 236 (1968) 12, 13, 14

Brewer v. Hoxie School District No. 46, 238 F.2d 91 (8th Cir. 1956) 12, 13

Brown v. Board of Education, 347 U.S. 483 (1954) 14

Craig v. Alabama State University, 451 F. Supp. 1207 (M.D. Ala. 1978), *aff'd*, 614 F.2d 1295 (5th Cir.), *cert. denied, sub nom., Dutt v. Alabama State University*, 449 U.S. 862 (1980) 12, 15

Craig v. Alabama State University, 804 F.2d 682 (11th Cir. 1986) 12, 15

DeFunis v. Odegaard, 416 U.S. 312 (1974) 7

Iron Arrow Honor Society v. Heckler, 464 U.S. 67 (1983) 6, 7

Papasan v. Allain, 478 U.S. —, 92 L.Ed.2d 209, 106 S. Ct. 2932 (1986) 13

School District of Kansas City v. State of Missouri, 460 F. Supp. 421 (W.D. Mo. 1978) 14, 15

Singleton v. Wulff, 428 U.S. 106 (1976) 14

Thomas v. Board of Trustees, 195 U.S. 207 (1904) 9

United States v. State of Alabama, 628 F. Supp. 1137 (N.D. Ala. 1985) 10

TABLE OF AUTHORITIES—Continued

Page

United States v. State of Alabama, 791 F.2d 1450 (11th Cir. 1986) ..... *passim*

United States v. State of Alabama, 796 F.2d 1478 (11th Cir. 1986) (en banc) 5

Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982) 14

Warth v. Seldin, 422 U.S. 490 (1975) 9

Washington v. Seattle School District No. 1, 458 U.S. 457 (1982) 12

OTHER AUTHORITIES

Civil Rights Act of 1964, Title VI ..... *passim*

U.S. Const., Art. III, Sec. 2, Cl. 1 7

U.S. Const., amend. XIV ..... *passim*

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Case or Controversy Requirement (ART. III, Sec. 2, Clause 1 of the Constitution):

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

ASU's Petition challenges a portion of the Eleventh Circuit's decision in Appeal No. 85-7582, reported at 791 F.2d 1450 (11th Cir. 1986). Understanding of that appeal requires review of the involved procedural history of the action from which it arose.

This action was initiated by the United States on July 11, 1983. The Complaint alleged that, based upon an investigation of higher education in Alabama, the United States Department of Education had found that the State of Alabama was in violation of Title VI of the Civil Rights Act of 1964 because of an alleged failure to eliminate the vestiges of a former racially dual system of higher education.[2]

ASU, a predominantly black institution which had been denominated a defendant in the United States' Complaint, moved to be realigned as plaintiff and to be al-

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[2]Specifically, the Complaint alleges that prior to 1953, the State of Alabama established and maintained a racially dual system of public higher education and that since 1953 the defendants have perpetuated the racially dual system of higher education by discrimination in student admissions, appointment of college and university governing boards, faculty hiring and assignment and allocation of the State's resources for higher education. The Complaint alleges that the enrollment, faculty and staff and governing boards of each of the institutions of higher education are still identifiable by race and that in Montgomery, Alabama and Huntsville, Alabama, the existence of Auburn University in Montgomery ("AUM") and the University of Alabama at Huntsville ("UAH"), in close proximity to ASU and A&M, respectively, impedes the ability of those traditionally black institutions to desegregate. Finally, the Complaint alleges that the State has discriminated in favor of Auburn and against A&M by selecting Auburn, and not A&M, to be the recipient of the bulk of the State's share of federal financial assistance for agricultural research and instruction.

lowed to assert claims against the other defendants on the grounds that it was "asserting a right to relief similar to that sought by plaintiff," and that it, "through the administrative officers of Alabama State University, has exerted every effort available to it to completely desegregate the faculty, staff and student body of Alabama State University."[3] The purpose of ASU's realignment, according to a resolution of the ASU Board of Trustees incorporated by reference in its Motion to Realign, was to maintain "the seniority of Alabama State University as an autonomous, full-service senior institution in the Montgomery area. . . ." The relief sought by ASU was the merger of AUM into ASU.[4]

Subsequent to the realignment of ASU,[5] the district court allowed the intervention of the Knight-Intervenors, a class represented by students, alumni, faculty and administrators of ASU and certified as consisting of graduates of ASU and black citizens of Alabama who are eligible for employment by or who attend or may attend public institutions of higher education in the Montgomery, Ala-

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[3]As discussed below at pp. 13-15, ASU has in fact acted to preserve its racial identity, at the expense of its desegregation. Such action was taken by the administration and trustees of ASU, and was not compelled by the State of any other defendant.

[4]AUM, created in 1967, has never been racially restricted in any respect. The creation of AUM was sanctioned in *Alabama State Teachers Association v. Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969), when this Court affirmed a three-judge court's rejection of the claims of a group of plaintiffs affiliated with ASU that the creation and operation of AUM would impede the desegregation of ASU.

[5]A&M also moved to realign itself as a plaintiff in order to assert claims under the Fourteenth Amendment and Title VI on the grounds that the "racially dual system of public higher education . . . has discriminated against and damaged Alabama A&M, a traditionally black institution of higher education. . . ."

bama area. The Knight-Intervenors' claims were identical to those of ASU and sought the merger of AUM into ASU.

There was no claim under the Pre-Trial Order, nor any evidence at trial, that any of the defendant institutions of higher education had denied admission to any student on the basis of race since 1967.[6]

Prior to the trial, ASU amended its claims; then, by a verified complaint filed with its Motion and Notice for Temporary Restraining Order, alleged that application of certain ASBE requirements to ASU would "have the effect of depriving Alabama State University of a major portion of its Teacher Education Program, in violation of due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and 42 U.S.C. §§ 1981 and 1983." ASBE faculty experience requirements, which mandate that some faculty members in an institution's education programs have practical experience in areas in which they teach, were alleged to have an adverse impact on blacks and on black institutions.[7] Subsequent to the conclusion of the trial on the merits but before the trial court rendered its decision, the ASBE voted not to re-certify certain undergraduate and graduate teacher education programs at ASU. On motion

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[6]The University of South Alabama, like AUM, had never been racially restricted since its creation in 1963.

[7]The adverse impact alleged was *not* that the experience requirements precluded black students from attending predominantly white colleges, but that predominantly black colleges would have to hire additional non-black faculty to satisfy the requirements. The claim was thus related to alleged racial discrimination, but not to segregation in higher education.

by ASU and the Knight-Intervenors,[8] the district court enjoined the ASBE to maintain the status quo pending resolution of the issues raised by the United States, the realigned plaintiffs and the Knight-Intervenors in the trial on the merits. The ASBE appealed the injunction to the United States Court of Appeals for the Eleventh Circuit, in Appeal No. 85-7582.

On December 9, 1985, the district court entered a 99-page order and opinion that held that vestiges of segregation did exist in Alabama's colleges, identified the vestiges and ordered that the Governor, the Alabama Public School and College Authority ("APSCA") and the Alabama Commission on Higher Education ("ACHE") submit a plan to eliminate each vestige.

Auburn and the University of Alabama appealed the district court's December order on February 5, 1986, in Appeal No. 86-7090. On February 7, 1986, Auburn moved in the district court for a stay of further proceedings in the district court, and upon the failure of the district court to act on the motion, motions for a stay were filed in the court of appeals on February 13, 1986. The court of appeals issued orders staying proceedings in the district court on February 14, 1986, the date scheduled for the submission of a plan in accordance with the district court's decision. ASU, A&M and the Knight-Intervenors filed motions in the court of appeals to dissolve the stay and to dismiss the appeals and, upon the denial by the court of appeals of these motions, petitioned for a Writ of Cer-

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[8]Contrary to ASU's assertion (Petition, pp. i, 1), the United States did not move for such temporary injunctive relief. *See* 791 F.2d 1450, 1454 (11th Cir. 1986).

tiorari in this Court (Case No. 85-1878) seeking the same relief. Such petitions were denied.

During the pendency of Appeal No. 86-7090 from the district court's December 9, 1986, order and opinion, the court of appeals held oral argument and entered its opinion in Appeal No. 85-7582 from the district court's order enjoining the ASBE from failing to certify ASU's teacher education programs. The court of appeals affirmed the injunction as to the Knight-Intervenors[9] to maintain the status quo, but it reversed the injunctive order as to ASU's claims, on the grounds that ASU had no substantive rights, and therefore no standing, under the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. Rehearing *en banc* was denied, 796 F.2d 1478 (11th Cir. 1986).

It is the court of appeals' decision that a state university has no substantive rights to equal protection or under Title VI that is now before this Court.

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SUMMARY OF ARGUMENT

The petitioners' request for Writ of Certiorari should be denied because: (1) the Petition for Writ of Certiorari is moot; (2) the court of appeals was correct in holding that a state university such as ASU does not have rights under the Equal Protection Clause of the Fourteenth Amendment or under Title VI of the Civil Rights Act of 1964, and therefore had no standing to protect non-

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[9]The court of appeals noted that the Knight-Intervenors' standing was "unchallenged" on that appeal. *See* 791 F.2d 1450, 1457 (11th Cir. 1986).

existent rights; (3) ASU's claims in the district court were not based upon the constitutional rights of its students and faculty but upon its own supposed rights as an institution, and ASU may not assert a new basis for its standing for the first time on appeal; and (4) ASU does not have standing to assert claims on behalf of its students and faculty.

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ARGUMENT

I. The Petition For Writ Of Certiorari Is Moot.

ASU urges this Court to engage in the purely academic exercise of vacating the court of appeals' judgment as to ASU's standing for no reason other than that "further questions about petitioner's role will probably be raised" in the court below (*see* Petition, p. 12). ASU admits that whatever action this Court takes on its Petition will have absolutely no effect on the result reached by the court of appeals with respect to the viability of the injunction ordered by the district court, and ASU does not challenge the issue that the court of appeals decided, whether ASU has rights under the Equal Protection Clause or Title VI. ASU's Petition is therefore moot. *Cf. Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983) (action taken by third party which deprives Court of ability to redress claim renders claim moot).

ASU's argument for the need to reverse the court of appeals is based upon the "mischievous consequences" which ASU anticipates if the panel which is to decide Appeal No. 86-7090 follows the holding that ASU lacks institutional rights (*see* Petition, p. 12). Yet Appeal No.

86-7090 has been briefed and awaits impending oral argument, while ASBE remains subject to the injunction affirmed as to the Knight-Intervenors. ASU has had a full opportunity to present its argument in support of its claims in Appeal No. 86-7090, and the court of appeals may still consider that argument.

As a practical matter, Appeal No. 86-7090 is likely to be decided after careful consideration of the logic and precedential value of the opinion in Appeal No. 85-7582; but until ASU is injured by legal error arising from that opinion, there is no basis for certiorari. Moreover, a Writ of Certiorari as to the second question raised by ASU's Petition (whether the court of appeals should have reached ASU's standing) would not prevent the panel in Appeal No. 86-7090 from applying the same reasoned analysis as did Judges Vance, Johnson, and Allgood in denying ASU's institutional rights claims.

Federal courts lack jurisdiction to decide cases that do not satisfy the "case or controversy" requirement of Article III because of mootness. *DeFunis v. Odegaard*, 416 U.S. 312 (1974). Concerns over future controversies do not keep alive a case which is moot because of the resolution of the present controversy. *See Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983). If ASU has a basis for *jus tertii* standing in some future action, nothing in the court of appeals' decision precludes it from taking such a position.[10] The court of appeals' decision should not be

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[10]ASU's claims relative to AUM are distinct from its claims relative to the ASBE experience requirements. ASU has not, however, in the appeal of the trial court's final order, attempted to explain what interest its students and factulty have with reference to its claims relative to AUM. Its entire argument in this regard is focused on itself as an institution.

vacated and the Petition for Writ of Certiorari should be denied.

II. A State University Has No Rights Under The Equal Protection Clause Or Title VI.

ASU's Petition does not challenge the significant substantive holding of the Court of Appeals as to ASU. The issue as to ASU in No. 85-7582 was whether ASU, as a state institution, had substantive rights, and therefore standing pursuant to the Equal Protection Clause or Title VI. The Court of Appeals reversed as to ASU's claims, holding "ASU . . . has no standing to sue or seek to enjoin the Alabama state board of education under Section 1983 and the Fourteenth Amendment." 791 F.2d at 1456, and held further, "Nothing in Title VI or its legislative history suggests the Congress conceived of a state instrumentality as a 'person' with rights under this statute." 791 F.2d at 1456.

The court of appeals squarely considered ASU's claims to institutional rights under the Equal Protection Clause and Title VI, and correctly rejected them.[11] That holding, which ASU fails to challenge directly in its Petition, is law of the case and mandates denial of ASU's Petition.

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[11]The cases cited in ASU's Petition do not stand for the broad proposition that a court should *never* decide any standing issue as long as at least one party has standing to assert identical claims. Rather, in these cases, the Court merely declined to perform an analysis of a party's standing where that of another party was established, thus insuring that the Court had jurisdiction of the issues presented to it. This does not mean that a decision of a court of appeals should be vacated merely because its decision on the petitioner's standing did not result in a complete reversal of the district court.

III. ASU May Not Assert Standing To Raise Claims On Behalf Of Its Students And Faculty For The First Time On Appeal.

" '[T]he presumption . . . is that the court below was without jurisdiction' unless 'the contrary apears affirmatively from the record.' " *Bender v. Williamsport Area School District,* 475 U.S. —, 89 L.Ed.2d 501, 514, 106 S. Ct. — (1986) (*quoting King Bridge Co. v. Otoe County,* 120 U.S. 225, 226 (1887)). A party's standing, therefore, "must be distinctly and positively averred in the pleadings or should appear affirmatively and with equal distinctness in other parts of the record, it not being sufficient that jurisdiction may be inferred argumentatively . . . ." *Thomas v. Board of Trustees,* 195 U.S. 207, 210 (1904); *accord Warth v. Seldin,* 422 U.S. 490, 518 (1975) ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers."). ASU's failure to assert the interests of its students or faculty in the district court precludes its claim of *jus tertii* standing on appeal. *See Bender, supra,* 89 L.Ed.2d at 516.

ASU first suggested that it sought standing to assert the rights of its students and faculty in its petition for rehearing in the court of appeals. There is nothing in the record to indicate that the injury alleged by ASU in this litigation was anything other than institutional in nature, and the remedy ASU seeks is the advancement of its institutional interests.[12]

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[12]ASU's interest as an institution in this case is "not necessarily parallel to the interest" of its students and faculty. *See*

(Continued on following page)

ASU's assertion that the court of appeals erred in holding that it had no standing is based entirely upon ASU's current contention that it is asserting the rights of its students and faculty and, therefore, has standing, not because of any Fourteenth Amendment rights of ASU as an institution but because of the rights of third parties who do have rights under the Fourteenth Amendment and Title VI. This argument fails because ASU's pleadings and evidence throughout this litigation make clear that its claims are based upon injuries to ASU as an institution, not injuries to its students or faculty. Exhibit 1 to ASU's Motion for Realignment, for example, clearly acknowledges that ASU's interest in this litigation is the preservation of its own "seniority"; *see* pp. A-5, A-6. When Auburn challenged ASU's standing in the district court, instead of arguing that it sought to represent the constitutional rights of its students and faculty, ASU argued that it, as an institution, had constitutional rights because of its independence from control by the State. In the trial on the merits, ASU's evidence focused on the alleged advantages of other institutions in the Montgomery area and their "competing" with ASU for students. *See U.S. v. State of Alabama*, 628 F. Supp. 1137, 1170 (N.D. Ala. 1985).[13]

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Bender v. Williamsport Area School District, 475 U.S. —, 89 L.Ed.2d 501, 515 n.9, 106 S. Ct. — (1986). Indeed, in the case at bar, the interest ASU asserts is *in conflict* with the constitutional rights of its students and faculty. *See* pp. 13-15, *infra*.

[13]ASU does not see the irony in its claim that competition by predominantly white and predominantly black institutions for students of all races is a form of "discrimination" against ASU. The evil of a racially dual system was precisely that institutions were not permitted to compete for all students.

The proceedings on ASU's request for injunctive relief out of which the court of appeals' decision arose also clearly illustrate that the interests asserted by ASU are institutional. The trial court found that the accreditation requirement attacked by ASU "disproportionately affects black faculty[14] and institutions," and that the "Board's failure to approve ASU teacher education programs . . . was a rather blatant effort to punish ASU for its exercise of the fundamental right to file and prosecute a lawsuit. . . ." The irreparable harm that the trial court found to support its injunction was that the "attractiveness of ASU as an unaccredited institution . . . will be non-existent."[15]

Auburn has consistently disputed that anyone (the United States, ASU, or the Knight-Intervenors) has a constitutional right to the relief sought for ASU. If, as the court of appeals held, neither the Equal Protection Clause nor Title VI created institutional rights for ASU, ASU lacks standing to raise those non-existent rights. Further, ASU cannot "bootstrap" itself into standing by retroactively arguing that it has standing to raise the interest of its students and faculty to assert the same, non-existent, institutional rights of ASU.

Whether ASU was a proper representative of its students or faculty as to the relief ASU seeks was a question presented neither in the district court nor in the court

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[14]The Knight-Intervenors represent black ASU faculty in this proceeding.

[15]The trial court did not find that any black person's employment would be terminated or that any black student would be deprived of an education because of the ASBE requirement or by its action in refusing to certify the ASU programs. (See appendix to Petition, pp. 17a-23a.)

of appeals.[16] Nor is there anything in the record to indicate that the evidence presented by ASU showed that it was being forced, as a consequence of obeying state law, to perpetuate segregation of its student body or faculty.[17]

IV. ASU Does Not Have Standing To Assert The Interests Of Its Students And Faculty.

Many cases have held that a local school board may have standing to assert the rights of its students and faculty because the school board members have been placed in a position of either violating state law or the constitutional rights of their students or faculty; *see Board of Education v. Allen ("Allen")*, 392 U.S. 236, 241 n.5 (1968); and because of the "close relationship" between the plaintiffs who seek to bring an action and the class of persons whose constitutional rights are claimed to be violated. *See Akron Board of Education v. State Board of Education ("Akron")*, 490 F.2d 1285, 1289 (6th Cir.), *cert. denied*, 417 U.S. 932 (1974); *see also, Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956) *("Hoxie")*. *Allen, Arkon, Hoxie* and their progeny[18] do

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[16]Auburn has also contested the standing of the Knight-Intervenors in Appeal No. 86-7090 as to the district court's decision on the merits. See n.19, *infra*.

[17]ASU's unlawful discrimination against white faculty, discussed at page 15 below, was done by ASU's administration, rather than the state or any state agency other than ASU. See *Craig v. Alabama State University*, 451 F. Supp. 1207, 1212-13 (M.D. Ala. 1978), *aff'd*, 614 F.2d 1295 (5th Cir.), *cert. denied, sub nom., Dutt v. Alabama State University*, 449 U.S. 862 (1980); *Craig v. Alabama State University*, 804 F.2d 682, 684 (11th Cir. 1986).

[18]Although the standing of the plaintiff was not discussed in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), that case presented a factual situation almost identical

(Continued on following page)

not, however, support the standing of ASU to assert the rights of its students and faculty in this case.

First, unlike the plaintiffs in *Allen*, *Hoxie* and *Akron*, ASU is not in the position of resisting a state law which it alleges will force it to take action that will *increase* segregation.

ASU, a university, differs significantly from the plaintiffs in *Allen*, *Hoxie* and *Akron* in the basis for its resistance to state authority. The members of its board of trustees are not claiming that actions of the state have put them in the position of either violating state law or the constitutional rights of their students. ASU alleged in its Motion To Realign that it has done everything in its power to desegregate but that it is being victimized by the actions of other agencies of the state. *See* p. A-2.[19] Where this conflict between adherence

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to that of *Board of Education v. Allen*, 392 U.S. 236 (1968). Similarly, in *Papasan v. Allain*, 478 U.S. —, 92 L.Ed.2d 209, 106 S. Ct. 2932 (1986), the standing of local school officials to assert the interests of school children under their charge was neither challenged by the respondents or addressed by the Court, apparently because the school children themselves were parties. *See Papasan*, 92 L.Ed.2d at 224-225. ASU's reliance on both cases is misplaced.

[19]Quite to the contrary, ASU resisted ASBE experience requirements for faculty, because most persons who satisfy those experience requirements are white. Hiring of experienced white persons would have furthered desegregation of ASU's disproportionately black faculty.

to state law and constitutional duty is absent, so is the basis for standing enunciated in *Allen* and its progeny. *Compare Allen, supra,* and *Akron, supra,* with *School District of Kansas City v. State of Missouri,* 460 F. Supp. 421, 440 (W.D. Mo. 1978).

Second, the class represented by the Knight-Intervenors in this case includes the students and faculty of ASU. Although the interests asserted by the Knight-Intervenors are in direct conflict with the notions of race neutrality and equal protection adhered to by this Court since *Brown v. Board of Education,* 347 U.S. 483 (1954),[20] these students and faculty are, nevertheless, represented in this case and are, therefore, not incapable of protecting their own interests, a condition to the invocation of the *jus tertii* doctrine. *See Singleton v. Wulff,* 428 U.S. 106, 113 (1976).

Third, prudential standing limitations militate against according standing to ASU to assert the rights of students

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[20]Auburn challenges the standing of the Knight-Intervenors in its appeal of the district court's final order on the ground that their claims do no more than assert the non-existent right of ASU, as an institution, to equal protection. *Cf. Valley Forge Christian College v. Americans United,* 454 U.S. 464, 476 n.14 (1982) (Respondent's standing claim is identical to that of parties whose interests it seeks to represent); and that they have no personal constitutional interest in the predominance of ASU in the Montgomery area. The validity of the Knight-Intervenors' claims, however, is irrelevant to the issue of whether ASU's students and faculty are capable of protecting their own interests.

and faculty. Other litigation and the evidence in this case indicates that ASU itself is guilty of racial discrimination. In *Craig v. Alabama State University,* 451 F. Supp. 1207 (M.D. Ala. 1978), *aff'd,* 614 F.2d 1295 (5th Cir.), *cert. denied, sub nom., Dutt v. Alabama State University,* 449 U.S. 862 (1980), the district court found that officials of ASU had discriminated in the hiring and promotion of white faculty. Recently, the United States Court of Appeals for the Eleventh Circuit held that discrimination against whites continues at ASU. *Craig v. Alabama State University,* 804 F.2d 682 (11th Cir. 1986). The evidence at trial in this case established that ASU's administration pursued its "black agenda" at the expense of attracting white students.

ASU's admitted desire to retain its racial character, coupled with its continuing racial discrimination, illustrate that it may not be willing to vigorously present all evidence of alleged racial discrimination in the operation of Alabama's public colleges. Such a conflict of interest should preclude *jus tertii* standing. *See School District of Kansas City v. State of Missouri,* 460 F. Supp. 421, 440-442 (W.D. Mo. 1978).

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CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

VS.

CASE NO.
CV-83-C-1676-S

THE STATE OF ALABAMA, et al.,

Defendants.

MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR REALIGNMENT AS PARTY-PLAINTIFF

The Board of Trustees for Alabama State University (hereinafter called "ASU") hereby moves to be realigned and treated as a party-plaintiff in this case. In support of this motion, defendant ASU represents and shows unto the Court the following:

1. Complaint in this case alleges, *inter alia,* that since 1953 the defendants, by their policies and practices, have maintained and perpetuated a dual system of public higher education based on race, and have failed to take affirmative steps to remove the vestiges of the dual educational system resulting from their policy of racial segregation in education.

2. The defendant ASU, recognizing the continued existence of a racially dual system of higher education in the Montgomery geographical area, proposed, through the administrative officers of Alabama State University, in Jan-

uary, 1980, the merger of Auburn University at Montgomery (hereinafter "AUM") and Troy State University at Montgomery (hereinafter "TSUM") into Alabama State University under the control and governance of the Board of Trustees for Alabama State University and with the name Alabama State University.

3. By resolution adopted January 15, 1981, the defendant ASU reaffirmed merger of AUM and TSUM into Alabama State University as the most equitable and effective method to disestablish the racially dual system of higher education in Montgomery. (A copy of the resolution is attached hereto as Exhibit I, incorporated herein by reference, and made a part hereof as if herein set forth in full.)

4. Defendant ASU has thus asserted, and is asserting a right to relief similar to that sought by plaintiff.

5. Defendant ASU, through the administrative officers of Alabama State University, has exerted every effort available to it to completely desegregate the faculty, staff and student body of Alabama State University.

6. Questions of law and fact common to defendant ASU and plaintiff will arise in this action.

7. Defendant ASU has an interest in the subject of this action in obtaining essentially the same relief demanded by plaintiff.

8. No party's rights will be adversely affected by realignment as the interest of defendant ASU coincides with that of plaintiff.

9. The interests of the co-defendants are antagonistic to the interests of the defendant ASU.

WHEREFORE, defendant ASU respectfully prays that this court take cognizance of this Motion, and after careful consideration of the matters and things set forth herein, enter an Order, pursuant to and in accordance with Federal Rules of Civil Procedure, Rules 20 and 21. realigning defendant ASU as party-plaintiff in this action.

Respectfully submitted,

GRAY, SEAY & LANGFORD

BY: /s/ Solomon S. Seay, Jr.
352 Dexter Avenue
Montgomery, Alabama 36104
(205) 269-2563

Attorney for Board of Trustees for
Alabama State University

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR REALIGNMENT AS PARTY-PLAINTIFF upon the following persons by placing copies of same in the United States Mail, first-class postage prepaid, on this the 3rd day of August, 1983:

Ira Dement—
Dement & Wise
P. O. Box 4163
Montgomery, Alabama 36101

FOR: George C. Wallace
The Alabama Commission on
Higher Education
The State of Alabama
The Alabama Public School
and College Authority

Glenn Powell—
P. O. Box 295
Tuscaloosa, Alabama 35401

FOR: The University of Alabama

and

Paul Skidmore
P. O. Box 6233
University, Alabama 35486

Charles Coody— FOR: Wayne Teague
Assistant Attorney General Alabama State Board of
Department of Education Education
State of Alabama
Montgomery, Alabama 36130

Thomas Thagard— FOR: Auburn University
P. O. Box 78
Montgomery, Alabama 36101
and
Edward Allen
Balch, Bingham, Baker, Ward,
Smith, Bowman & Thagard
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J. Frederic Ingram— FOR: Livingston University
William F. Murray, Jr.
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Frank Ellis, Jr.— FOR: The University of Montevallo
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Robert Potts— FOR: The University of North Alabama
107 East College Street
Florence, Alabama 35630

Maxey Roberts— FOR: The University of South Alabama
The University of South Alabama
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William Bradford Reynolds
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United States Attorney
Federal Courthouse
1800 5th Avenue North
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Thomas M. Keeling
Harvey L. Handley, III
Jay P. Heubert
General Litigation Section
Civil Rights Division
Department of Justice
Washington, D. C. 20530

/s/ Solomon S. Seay, Jr.

EXHIBIT I

POLICY ON UNIVERSITY DESEGREGATION

WHEREAS, the U.S. Department of Education, Office of Civil Rights, has notified Governor Fob James that the State of Alabama has failed to eliminate vestiges of the former *de jure* racially dual system of higher education; and

WHEREAS, the State is given a limited time in which to submit to the Department a statewide desegregation plan; and

WHEREAS, any such plan would involve Alabama State University.

BE IT THEREFORE RESOLVED, That the Board of Trustees for Alabama State University reaffirms the position that the seniority of Alabama State University as an autonomous, full-service senior institution in the Montgomery area be recognized in any future desegregation plan as is now provided under the statutes of Alabama (H.B. 494, Act 79-461).

BE IT ALSO RESOLVED, That the Board focuses attention on its status as the only Montgomery-based university governance body established under Alabama statutes and calls upon the Legislature and the Governor for such additional powers and duties as would be necessary for management and control of all higher education offerings in the event of change in the governance of the Montgomery branches of Auburn University and Troy State to accommodate any plan for further desegregation, academic or economic improvement.

BE IT FURTHER RESOLVED, That in event of consolidation or merger and/or any change of identity involving Alabama State and the Montgomery branches of Auburn University and Troy State, the Board hereby calls upon the Legislature and the Governor to safeguard and preserve the name "ALABAMA STATE UNIVERSITY."

Agenda Item #6

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

VS.

CIVIL ACTION NO. CV-83-C-1676-S

THE STATE OF ALABAMA, et al.,

Defendants.

MOTION AND NOTICE FOR TEMPORARY RESTRAINING ORDER

Realigned Plaintiff Board of Trustees for Alabama State University hereby moves this Court for a Temporary Restraining Order restraining and enjoining the defendants Alabama State Board of Education and Wayne Teague, State Superintendent of Education, their agents, employees, successors, attorneys, and all persons in active concert and participation with them, from failing and refusing to take the necessary steps to recertify the following Education Programs at Alabama State University, pending a hearing and determination of realigned plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction: Class A Superintendent, Class AA Superintendent, Class A General Supervisor, Class AA General Supervisor, and Class AA Reading Supervisor.

Unless this motion is granted, realigned plaintiff Board of Trustees for Alabama State University will suffer immediate and irreparable injury, loss and damage if defendants are permitted to decertify the above-enumerated programs until a hearing can be had on this motion, as more fully appears from the verified Complaint attached hereto.

DATED this 13th day of August, 1985

Respectfully submitted,

/s/ SOLOMON S. SEAY, JR.

/s/ TERRY G. DAVIS

ATTORNEYS FOR REALIGNED
PLAINTIFF
BOARD OF TRUSTEES FOR ALABAMA
STATE UNIVERSITY
732 Carter Hill Road
Post Office Box 6215
Montgomery, Alabama 36106
(205) 834-2000

NOTICE OF MOTION

TO: ALL ATTORNEYS OF RECORD FOR DEFENDANTS IN THE ABOVE-STYLED CAUSE

Please take notice that on the — day of ————, 1985 at 9:00 o'clock a.m., or as soon thereafter as counsel can be heard, the undersigned will bring the above motion on for hearing before the Honorable U. W. Clemon, United States District Judge, at the United States Courthouse, Birmingham, Alabama.

/s/ SOLOMON S. SEAY, JR.

/s/ TERRY G. DAVIS

CERTIFICATE OF COUNSEL

STATE OF ALABAMA)
MONTGOMERY COUNTY)

I, the undersigned attorney of record for Realigned Plaintiff Board of Trustees for Alabama State University,

hereby certify that a copy of the above and foregoing motion was mailed to the attorneys for all of the parties on the 13th day of August, 1985.

I further hereby certify that a copy of the above and foregoing motion was hand delivered to the Office of Attorney Charles Coody, the attorney representing defendants Alabama State Board of Education and Wayne Teague, State Superintendent of Education, and that I was advised by Mr. Coody's Office that he would be out of town until Thursday, August 15, 1985.

/s/ SOLOMON S. SEAY, JR.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

VS.

CIVIL ACTION
NO. CV-83-C-1676-S

THE STATE OF ALABAMA, et al.,

Defendants.

COMPLAINT

Jurisdiction

1. This action arises under the Fourteenth Amendment to the Constitution of the United States, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq.*, the Civil Rights Act of 1871, 42 U.S.C. §§ 1981 and 1983, and the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000. Jurisdiction of this court is invoked pursuant to the provisions of 28 U.S.C. §§ 1331, 1343(3), and 1341(4), 2201 and 2202.

Parties

2. The parties to this action are correctly enumerated in this Court's Principal Pretrial Order dated February 19, 1985; except Livingston University and the University of Montevallo, whose Rule 41(b) motions were granted.

Allegations of Fact

2. Realigned Plaintiff Board of Trustees for Alabama State University in its statement of Amended Claims, heretofore filed in this case, alleged:

"12. Exercising its authority under *Ala. Code,* Sec. 16-24-14 (1975), the defendant State Board has also prescribed minimum requirements for faculty members in programs for instructional support personnel. Approval of an institution's teacher education program is contingent upon meeting these requirements which include the following:

a. That they hold an earned doctorate, or the equivalent, with a major emphasis in the field of specialization in which the major workload is assigned;

b. That they have a minimum of three years of successful experience as a practitioner in the instructional support area in which the major workload is assigned;

c. That at least one faculty member in each instructional support area in which a program leading to certification is offered shall hold an earned doctorate with an area of specialization in that field.

"13. In May 1984, a review team appointed by the defendant State Superintendent of Education recommended that no students be admitted to the following programs at ASU because faculty members in these programs did not meet some or all of the aforegoing faculty requirements:

a. The Class A and Class AA Superintendent Program: of the two faculty members in this program at ASU, both have the appropriate doctorates, but neither has three years experience as superintendent. One faculty member with an appropriate degree and three years of experience as a superintendent is required for the Class A program; two such faculty members are required for the Class AA program.

b. The Class A and Class AA General Supervisor Program: of the two faculty members in this program at ASU, both lack the required doctoral

level preparation in supervision, and both lack the three years of experience as a supervisor. One faculty member with appropriate preparation and experience is required for the Class A program; two such faculty members are required for the Class AA program.

c. The Class A and Class AA Reading Supervisor Program: of the two faculty members in this program at ASU, both have the required doctoral level preparation, but neither has three years of experience as reading supervisor. One faculty member with appropriate doctoral level preparation and three years of experience as a reading supervisor is required for the Class A program; two such faculty members are required for the Class AA program.

d. The Class A and Class AA Library Media Program: the one faculty member in this program at ASU is fully qualified, but State Board regulations require a minimum of two faculty members meeting the aforesaid requirements for the Class A program. No additional faculty member is required for the Class AA program."

3. The Amended Claims further alleged that:

"14. The State Board's requirements for faculty in programs for instructional support personnel and the recommendations of the May 1984 review team at ASU have an adverse racial impact on black students and traditionally black institutions, including ASU, and they perpetuate the vestiges of the prior *de jure* system of racial segregation at all levels of public education in Alabama. Because of historical segregation and racial discrimination against black students and black professionals, there are disproportionately few black educators who can satisfy faculty requirements for instructional support personnel programs, namely, three years experience as a superintendent, supervisor, reading supervisor or supervisor of library media and doc-

toral level preparation in those specific fields of specialization."

"15. The faculty requirements for instructional support personnel programs are not necessary for the successful operation of such programs or for the successful preparation of students in those programs."

"16. The requirements for faculty in instructional support personnel programs have both the purpose and the effect of discriminating against black students, black professionals and traditionally black institutions."

4. The Amended Claims also sought, *inter alia,* preliminary and permanent injunctions restraining and enjoining the defendants from continuing to enforce the minimum faculty requirements for instructional support personnel programs.

5. On, to-wit, the 8th day of August, 1985, the defendant State Board of Education failed and refused to recertify the Class A and Class AA Superintendent Programs, the Class A and Class AA General Supervisor Programs, and the Class AA Reading Supervisor Program at Alabama State University, allegedly by reason of the fact that Alabama State University failed to meet the faculty experiential requirement. The Board's action had the purpose and effect of decertifying said programs after September 9, 1985. A copy of the State Board of Education's resolution is attached hereto as Exhibit 1, and incorporated herein by reference and made a part hereof as if herein set forth in full.

6. Faculty personnel assigned to the above-named instructional support personnel programs at Alabama State University are all persons with faculty rank and tenure, and

are otherwise qualified except for experiential requirements. Each is black.

7. Experiential requirements adopted by the Board, and the action of the defendant Board in decertifying the programs at Alabama State University have both the purpose and effect of discriminating against black students, black professionals and traditionally black Alabama State University.

8. Unless restrained and enjoined by this Honorable Court, the action of said Board will have the effect of depriving Alabama State University of a major portion of its Teacher Education Program, in violation of due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and 42 U.S.C. §§ 1981 and 1983.

PRAYER FOR RELIEF

WHEREFORE, Realigned Plaintiff Board of Trustees for Alabama State University respectfully prays that this Court take cognizance of this Complaint for Temporary Restraining Order and for Preliminary Injunction, and after careful consideration of the matters and things set forth herein, enter Temporary Restraining Order and Preliminary Injunction:

(1) restraining and enjoining defendants State Board of Education and Wayne Teague, State Superintendent of Education, and all persons in active concert and participation with them, from failing and refusing to recertify the Class A Superintendent, Class AA Superintendent, Class A General Supervisor, Class AA General Supervisor, and Class AA Reading Supervisor Programs at Alabama State Uni-

versity pending final hearing and determination of this claim;

(2) mandatorily requiring that the defendants State Board of Education and Wayne Teague, State Superintendent of Education. and all persons in active concert and participation with them, recertify the Class A Superintendent, Class AA Superintendent, Class A General Supervisor, Class AA General Supervisor, and Class A Reading Supervisor Programs at Alabama State University pending final hearing and determination of the merits of this claim.

Respectfully submitted,

/s/ SOLOMON S. SEAY, JR.

/s/ TERRY G. DAVIS
ATTORNEYS FOR REALIGNED PLAINTIFF BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY

ADDRESS OF COUNSEL:

732 Carter Hill Road
Post Office Box 6215
Montgomery, AL 36106
(205) 834-2000

STATE OF ALABAMA)
MONTGOMERY COUNTY)

I hereby certify that I have read the foregoing Complaint, and know the contents thereof, and that the matters and things set forth therein are true and correct to the best of my knowledge, information and belief.

/s/ BEATRICE MORSE

SWORN TO AND SUBSCRIBED before me this the 13th day of August, 1985.

/s/ Solomon S. Seay, Jr.
NOTARY PUBLIC
STATE OF ALABAMA AT LARGE
MY COMMISSION
EXPIRES: 2-1-89

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing COMPLAINT upon the following persons, by placing same in the United States Mail, first-class postage prepaid, on this the 13th day of August, 1985:

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Franz Marshall
Leverne M. Younger
Pauline A. Miller
Jeanne K. Pettenati
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Engel & Smith
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Mobile, Alabama 36633

/s/ Solomon S. Seay, Jr.

[Exhibits Omitted]

Charles R. CRAIG, for himself and for all others similarly situated, Plaintiffs,

Dorothy D. Moore, Plaintiff-Appellant,

v.

ALABAMA STATE UNIVERSITY; Levi Watkins, individually and in his official capacity as President of Alabama State University; the Board of Trustees of Alabama State University; Mrs. L.W. Noonan; Dr. R.J. McLaughlin; Mayor Andrew M. Hayden; Ross Dunn; Robert L. Potts; Tom Radney; Lewis J. Willie; Mayor A.A. Chandler; and Robert L. Glynn, individually and in their official capacities as Members of the Board of Trustees of Alabama State University; Ed Moss; Dr. Aaron Van Wright and Isaac Sanders, Defendants-Appellees.

No. 85-7325.

United States Circuit Court,
Eleventh Circuit.

Nov. 18, 1986.

White applicant, who had been denied administrative position at state university having staff which was already over 70% black, filed employment discrimination suit under Title VII. The United States District Court, Middle District of Alabama, No. 76-21-N, Truman M. Hobbs, Chief Judge, entered judgment in favor of university, and appeal was taken. The Court of Appeals, Morgan, Senior Circuit Judge, held that: (1) applicant for administrative position in state university, whose application was denied based on university's policy of granting hiring preferences to current employees on work study program, made prima facie showing of discrimination impact based on imbalanced nature of university's work force, and (2) university failed to show that hiring policy was justified as "business necessity."

Reversed and remanded.

1. Civil Rights 9.10

Any Title VII claim may be analyzed in terms of disparate impact, though claim is brought by individual plaintiff based on defendant's failure to hire her to particular position. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. Civil Rights 44(1)

Applicant for position at state university, made prima facie showing that university's facially neutral policy of granting hiring preferences to current employees had discriminatory impact, where university's work force was already imbalanced. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Civil Rights 43

In Title VII action, employer had burden of articulating and proving that there was "business necessity" for adopting hiring practice that had discriminatory impact. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Civil Rights 44(1)

University failed to show that its policy of granting hiring preference to current employees on work study program was justified by "business necessity," for purpose of unsuccessful applicant's Title VII suit, where preference was not tied to requirement that course of study pursued by employee bear a particular relation to requirements of job being applied for. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Alexander W. Jones, Jr., Pritchard, McCall, Jones, Spencer & O'Kelley, F. Hilton-Green Tomlinson, Robert L. Wiggins, Jr., Gordon Silberman, Wiggins & Childs, Robert F. Childs, Jr., Birmingham, Ala., for plaintiff-appellant.

Solomon S. Seay, Jr., Montgomery, Ala., for defendants-appellees.

Appeal from the United States District Court for the Middle District of Alabama.

Before TJOFLAT and ANDERSON Circuit Judges, and MORGAN, Senior Circuit Judge.

MORGAN, Senior Circuit Judge:

Appellant Dorothy Moore appeals from an adverse decision rendered below on the merits of her claim brought under Title VII of the Civil Rights Act alleging racial discrimination by Alabama State University in relation to her application for employment. The appellant contends that the lower court erred in failing to properly apply disparate impact analysis to the facts of this case. Having reviewed the record, we agree that the district court's analysis was flawed and reverse and remand for determination of the appropriate remedy.

I.

This lawsuit has its genesis in an earlier discrimination suit leveled against Alabama State University (ASU) in the 1970's. In that suit, styled *Craig v. Alabama State University*, 451 F.Supp. 1207 (M.D.Ala. 1978), then District Judge Frank M. Johnson, Jr. found that Alabama State University had engaged in a pattern and practice of discrimination against whites in the hiring of administrative, clerical and support staff, as well as faculty. That finding

culminated in appropriate injunctive relief forbidding any further discrimination on the part of ASU in all aspects of hiring practices at the university. The instant case was filed as a continuation of these prior proceedings in the form of a Motion For Contempt alleging that the defendants had violated the court's 1978 injunction prohibiting discriminatory employment practices.

The facts from which the Motion For Contempt arose involved appellant Dorothy Moore's application for the position of Federal Relations Director at ASU in 1983. Many of the facts underlying her claim, as found by the district court, are largely undisputed, and we of course accept the factual findings of the district court as correct unless clearly erroneous. *See Pullman-Standard v. Swint,* 456 U.S. 273, 289-90, 102 S.Ct. 1781, 1790-91, 72 L.Ed.2d 66 (1982). The district court found that the appellant is a white female who in 1983 approached Dr. Robert Randolph, the President of ASU, in search of a position at the institution. She was advised that although nothing was presently available, if grant funds could be obtained she could be employed on a temporary basis. Subsequently, in light of indications that the appellant had obtained such a grant commitment to commence later in the year, Randolph employed her on an interim basis in the job of Acting Assistant Director of Federal Relations.[1] That position bore the responsibility of acquiring grants for the university.

---

1. Moore was actually hired under the title of Assistant Director of University Relations. Testimony at trial indicated that the university relations position and the federal relations position were essentially one in the same. The reason for the difference in the titles relates to a proposed organizational change that never took place and is not relevant to the issues at hand. The district court apparently utilized only the title of Director of Federal Relations, and for purposes of uniformity, we shall also.

At the time the appellant assumed the position, she was given two contracts. The first covered the limited period of July 1 to September 30, 1983, and the second from October 1, 1983 to September 28, 1984. At the time that the appellant assumed the position, it was understood that eventually the opening would have to be advertised according to university policy for permanent positions, although the president did have authority to fill such positions in the interim. Thereafter, at a meeting of the Board of Trustees of ASU on August 15, 1983, the matter of appellant Moore's employment came to the attention of the Board. The Board was not apprised of her second contract, and accordingly concluded that its obligation to Ms. Moore ceased upon the expiration of the first contract. After the Board meeting, Dr. Randolph contacted the appellant and informed her that in light of the Board's posture, her contract would "self-destruct" at the end of the first contract. The plaintiff testified and the district court found, that at that point she voluntarily "stepped aside" from the second contract based upon assurances that the job would have to be advertised and that she should apply for it. The position was thereafter advertised in *The Chronicle of Higher Education* dated August 31, 1983, with applications being invited until the deadline of September 30, 1983. Close to this time, a Search Committee was formed to review applications for the Director of Federal Relations position.

In the meantime, another set of events was transpiring which would have a direct effect upon the appellant's application for the position of Director of Federal Relations. In August of 1983, Ms. Jacqueline Mallory Williams contacted ASU and advised the university that she was now available for re-employment pursuant to a study leave agreement that she had entered with the university on September 25,

1981. Mrs. Williams, who is black, had been employed at the university since 1964. Prior to taking study leave, she had been an assistant to Dr. Randolph's predecessor, Dr. Levi Watkins. The letter agreement provided that Ms. Williams would be granted a two-year study leave to pursue her doctorate degree at the University of Alabama at Tuscaloosa, during which time she would continue to receive a partial salary from ASU. Upon completion of her studies, the agreement provided for her return to ASU in a "faculty or other mutually acceptable position" at her previous salary, which was $31,420.00 per year. Early in September of 1983, Ms. Williams again contacted the university regarding her availability and a list of potential vacant positions was compiled for her scrutiny. Only one of the available positions, Athletic Director, provided a salary commensurate with Ms. Williams' previous salary.

On September 24, 1983, the Board of Trustees for ASU met again. At that meeting Dr. Randolph recommended to the Board that Ms. Williams be hired as Director of Federal Relations, a position that she had expressed some interest in shortly before the meeting, and the Board accepted this recommendation. Although the position had an advertised salary range of $21,000-$25,000 per year, Ms. Williams' contract was issued in the amount of $31,420.00, concomitant with her salary prior to taking study leave. After this action was taken on September 24, 1983, the appellant filed an application for the position on September 30, 1983, inasmuch as she was not informed that the position had been given to Ms. Williams. The parties stipulated that the Search Committee was disbanded without having reviewed any applications, and the Board considered only Ms. Williams' qualifications in making the decision to fill the posi-

tion. Although the position was filled before the close of the application period, none of the applicants, including the appellant, were notified of that fact until sometime in October of 1983.

In sum, the district court found that both the appellant and Ms. Williams were qualified for the position of Director of Federal Relations. Although the university had a policy allowing the appointment of temporary employees to fill vacancies, those temporary employees received no enhanced rights regarding permanent appointment to the position vis-a-vis other applicants. The court concluded that "Ms. Williams was hired as Director of Federal Relations because of the obligation of the University to find her a 'mutually acceptable' job upon her return from study leave and that the position of Director of Federal Relations was the only available job which met the requirements of the University's obligations and was consistent with Ms. Williams' qualifications." [Rec. at 097].

On appeal, the appellant raises only one challenge to the adverse decision below—that the district court erred in its application of disparate impact analysis to the aforementioned factual findings.[2]

II.

Disparate impact analysis in Title VII cases emanates from the Supreme Court case of *Griggs v. Duke Power Co.*,

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2. The appellant also raised a Title VII claim for disparate treatment and a breach of contract claim arising out of the cancellation of her second contract. The district court's adverse rulings on these claims are not on appeal here.

401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) and its offspring. *See, e.g., Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *Dothard v. Rawlinson,* 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). These cases set forth a tripartite scheme of analysis for employment practices that are "fair in form, but discriminatory in operation." First, to establish a prima facie case of discrimination in such cases, the complaining party must demonstrate that the defendant employed a facially neutral employment practice that had a significant discriminatory impact. The burden then shifts to the employer to show that the challenged employment practice has a "manifest relationship" to the employment in question, or in other words that it is supported by "business necessity." *See Griggs,* 401 U.S. at 431-32, 91 S.Ct. at 853-54, 28 L.Ed.2d at 164-65. Should the employer carry that burden, the employee must still be provided the opportunity to demonstrate that the employer was using the practice as a pretext for discrimination or that other criteria were available with a lesser adverse impact on the minority that would still serve the employer's needs. *See Albemarle Paper Co.,* 422 U.S. at 425, 95 S.Ct. at 2375, 45 L.Ed.2d at 301.

The first task in this case, therefore, is to determine whether the appellant carried her burden of demonstrating that the defendant engaged in a facially neutral employment policy or practice that had a significant discriminatory impact on white persons. *Griggs* counsels that disparate impact is shown not only where a direct adverse impact can be shown, but also where "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, . . . operate to 'freeze' the status quo of

prior discriminatory employment practices." 401 U.S. at 430, 91 S.Ct. at 853, 28 L.Ed.2d at 163. *See also Giles v. Ireland,* 742 F.2d 1366, 1379-81 (11th Cir. 1984).

The appellant urges that ASU had an employment practice of granting hiring preferences to its current employees embodied by the individual study leave agreement entered with Williams. The district court found that this agreement represented the university's study leave policy.[3] A preference to hire from within is facially neutral—all outside applicants, regardless of race, are excluded from consideration for a vacancy being filled. But where, as here, the employer in the past exercised a pattern of racial discrimination, the failure to consider outside applicants necessarily impacts more harshly on minorities because the preference operates to their total exclusion and to the benefit of the employer's racially skewed workforce.[4] In analogous reasoning, the Tenth Circuit has observed that

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3. Rec. at 096; 101.

4. The following excerpts are taken from the university's compliance reports filed pursuant to the *Craig* injunction:

ALABAMA STATE UNIVERSITY
WORKFORCE PERCENTAGES

	Oct. 1978	Oct. 1981	Nov. 1984
ADMINISTRATIVE			
White	6%	13%	10%
Black	94%	87%	90%
INSTRUCTIONAL			
White	22%	29%	25%
Black	70%	64%	67%
PROFESSIONAL			
White	6%	8%	3%
Black	94%	92%	95%

"It is beyond argument that a rating procedure used by an historically segregated employer which favors applicants already employed full-time falls squarely within the prohibition of *Griggs*." *Thornton v. Coffey*, 618 F.2d 686, 691 (10th Cir.1980). Judge Johnson's earlier decision in *Craig* establishes that ASU engaged in purposeful discrimination in all phases of employment practices resulting in an overwhelming imbalance in the racial composition of its workforce, *see* 451 F.Supp. at 1208, that persists virtually unchanged.[5] The utilization of a hiring preference

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5. In this regard, the lower court concluded:

> While this Court was disturbed by some of the testimony with respect to efforts being made to comply with the letter and spirit of the *Craig* order at ASU, this is not a matter which moves this Court to action under *Craig*. The testimony at trial, however, which did relate to compliance with *Craig*, has moved this court to a determination that future *Craig* compliance reports shall be more carefully scrutinized.

Rec. at 106. Testimony at trial indicated that ASU has had an affirmative action plan in place since 1978, *see* Plaintiff's Exhibit No. 26, that went unused and was virtually inoperative from at least 1980-1985. *See* Rec. at 123; 141-44; 373-74. Furthermore, we note that the *Craig* injunction directed that the university file compliance reports at six month intervals setting forth "by category (administrative, teaching, clerical, and support) and race, the staff employed, applications received, new hirees, and tenure and promotions granted." Supp.Rec. at 145. Although Moore was reported as a new white hire, Defendant's Exhibit No. 22, at 6; Defendant's Exhibit No. 25, at 4, the reports from the relevant period do not report the hiring of Williams into the Director of Federal Relations position at all as either a "new hire" or a "promotion." Defendant's Exhibit Nos. 22 and 23. Presumably, this was because of testimony at trial that since Williams was never taken off of the university's payroll, she was "reassigned" to the Director's position. Nevertheless, it certainly raises questions as to whether those taking study leave are properly reported under the *Craig* injunction.

in such circumstances, as we see it, is the plainest means possible of perpetuating the status quo of a racially imbalanced workforce.

[1] Although the appellees' contentions are far from clear, they contend that disparate impact analysis is inappropriate as to individual, rather than class, claims and that an "ad hoc" or "one shot" application of a selection criteria cannot have a disparate impact. Any given case, however, may be analyzed in terms of disparate treatment or disparate impact, *Teamsters v. United States,* 431 U.S. 324, — 338 n. 15, 97 S.Ct. 1843, 1855 n. 15, 52 L.Ed.2d 396, 415 n. 15 (1977), and as the Supreme Court observed in *Connecticut v. Teal,* 457 U.S. 440, 455-56, 102 S.Ct. 2525, 2535, 73 L.Ed. 2d 130, 143 (1982), every *individual* employee is protected against discriminatory treatment *and* neutral practices that are discriminatory in operation. Relying upon such reasoning, two courts have explicitly concluded that disparate impact claims may be brought by aggrieved individuals in a private, non-class action. *See Lasso v. Woodmen of World Life Ins. Co.,* 741 F.2d 1241, 1245 (10th Cir. 1984), *cert. denied,* — U.S. —, 105 S.Ct. 2320, 85 L.Ed.2d 839 (1985); *Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers,* 568 F.2d 558, 566 (8th Cir. 1977). Numerous other courts have implicitly concluded as much by applying disparate impact analysis to individual claims pending before them. *See Nash v. Consolidated City of Jacksonville,* 763 F.2d 1393, 1397 (11th Cir.1985); *Walker v. Jefferson County Home,* 726 F.2d 1554, 1557 (11th Cir.1984). We perceive no impediment to using disparate impact analysis as to the appellant's individual claim.

The appellees also contend that an "ad hoc" application of a selection criteria cannot have a disparate impact, although they cite no authority for this proposition. Most of the authority we have found seems to support this view, although there are also indications to the contrary. *Compare Peters v. Lieuallen*, 746 F.2d 1390, 1392 (9th Cir. 1984); *Yartzoff v. State of Oregon*, 745 F.2d 557, 558-59 (9th Cir.1984); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 121 (3rd Cir.), *cert. denied*, 464 U.S. 937, 104 S.Ct. 348, 78 L.Ed.2d 314 (1983); *Coe v. Yellow Freight System, Inc.*, 646 F.2d 444, 451 (10th Cir.1981), *with Walker v. Jefferson County Home*, 726 F.2d 1554, 1558 (11th Cir.1984); *Massarsky v. General Motors Corp.*, 706 F.2d at 130-131 (Sloviter, J., dissenting); *Thornton v. Coffey*, 618 F.2d 686, 690-91 (10th Cir.1980). *Walker*, the decision from this circuit, involved an individual disparate impact claim brought by an employee of the county home challenging her failure to receive the position of Housekeeping Department supervisor. The home had established a requirement of prior supervisory experience as a qualification for the position, which was neutral on its face because it applied to all applicants. The requirement had an adverse effect on black employees, however, because of the home's prior discrimination in favoring whites for promotion into positions in which the supervisory experience could be obtained. The court therefore found a prima facie case of disparate impact on the black employees as a class while analyzing the impact of the supervisory experience criteria only in the context of the one supervisory position at issue, which was awarded to a white employee who had prior supervisory experience. 726 F.2d at 1558.

Even if *Walker* is not determinative here, the appellees' "ad hoc" theory fails factually based upon the record adduced below. As noted earlier, the district court found that Williams' study leave agreement constituted the university's study leave policy. At trial, Jacqueline Williams identified a list of 99 persons who had taken study leave from the university during the tenure of Dr. Watkins as president. From that list, she identified numerous persons aside from herself who had taken non-academic study leave.[6] This testimony was sufficient to rebut the appellees' contention that the hiring preference shown as to Ms. Williams was nothing more than an "isolated" or "ad hoc" occurrence.[7]

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6. *See* Rec. at 290-98; Defendant's Exhibit No. 42, at 52-53.

7. The logical corollary of this argument, which the appellees may be asserting, is that this factual showing does not demonstrate disparate impact because the appellant did not produce a statistical breakdown of the racial makeup of employees who took study leave. Rather, the appellant must rely solely on the statistical evidence that the university's workforce was 70% to 90 percent black in most relevant categories, *see supra* note 4, and therefore the practice of giving a preference to members of the workforce weighs more heavily on whites, or at least perpetuates the status quo. We recognize that a "plaintiff must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue." *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750, 753 (5th Cir.1981), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). Nevertheless, the appellees have not cited any authority for the proposition that the *only* way of proving that impact is through statistics of the actual racial composition produced through operation of the criteria. Rather, as the Fourth Circuit observed in *Mitchell v. Board of Trustees of Pickens County*, 599 F.2d 582, 585 n. 7 (4th

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[2] Finally, in regard to the appellant's initial burden, the real heart of the appellees' argument seems to be the

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Cir.), *cert. denied*, 444 U.S. 965, 100 S.Ct. 453, 62 L.Ed.2d 378 (1979):

> Statistical proof of actual applications is not of course indispensable to proving the disparate impact *prima facie* case, particularly where, as here, the action is individual and not class. Circumstantial evidence, complemented by judicial notice to show that a facially neutral policy must in the ordinary course have a disparate impact on a protected group of which an individual plaintiff is a member is often utilized.

See also Wright v. National Archives & Records Service, 609 F.2d 702, 712 (4th Cir.1979) (recognizing *Mitchell* in context of a race claim). In *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir.1980), *cert. denied*, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981), the court found a policy that made over 90 percent of the protected age class ineligible for hiring to be discriminatory as a matter of law "since, absent countervailing statistics, the likelihood of a [protected] person . . . being selected under the policy would be substantially less than that of a [non-protected] person . . . ." In line with such reasoning, in *Walker* we eschewed statistical analysis altogether in a perpetuation of prior discrimination case where actual impact was shown on the individual minority member and the discriminatory impact was obvious from the record. And as the Supreme Court has cautioned in regard to reliance on statistics, a plaintiff is "not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement's grossly discriminatory impact." *Dothard v. Rawlinson*, 433 U.S. 321, 331, 97 S.Ct. 2720, 2727, 53 L.Ed.2d 786, 798 (1977). In short, the workforce composition statistics are not so weak as to merely raise an "inference" based upon speculation or conjecture. *See Sakellar v. Lockheed Missile and Space Co.*, 765 F.2d 1453, 1456-57 (9th Cir. 1985); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 121 & n. 18 (3d Cir.), *cert. denied*, 464 U.S. 937, 104 S.Ct. 348, 78 L.Ed.2d 314 (1983). Rather, we view them as strong probative evidence that a hiring preference granted employees within the workforce will perpetuate that racial imbalance sufficient to carry the appellant's initial burden of proof.

lower court's conclusion that the university acted as it did in response to its contractual obligation to Williams, and that therefore there was no "hiring preference" involved in the selection of the Director of Federal Relations.[8] It appears to us, however, that the form taken by the selection criteria (i.e.. as a contractual obligation) is irrelevant to the inquiry at hand. The university was under no compulsion to enter the study leave contract with Williams. In fact, because of its prior discriminatory employment practices, the university had an obligation under *Griggs* to not utilize selection criteria that maintain the status quo of its racially imbalanced workforce. It is circuitous indeed to reason that the university can avoid that obligation by *voluntarily* entering contracts with individual employees that have just that effect, and then set up those contractual obligations as a defense to the discriminatory effects flowing therefrom. *Compare W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983) (where company voluntarily entered both conflicting collective bargaining agreement and conciliation agreement,

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8. The lower court undertook no discernible analysis in finding no hiring preference, which leaves us somewhat in the dark as to its exact reasoning in making that finding. It appears unlikely, however, that the court concluded as a pure *factual* finding that there was no hiring preference afforded Williams here. The study leave contract on its face states an obligation to reemploy Williams, which the university unquestionably treated as entitling her to whatever position it deemed acceptable without considering the effect on any other applicants. *See*, e.g., Rec. at 36; 392; 410-11. Any finding to the contrary would be clearly erroneous. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518, 528 (1985).

and the company chose to violate the collective agreement in making layoffs in order to avoid Title VII liability, public policy did not forbid liability under the collective agreement because the company was "cornered by its own actions"); *Williams v. New Orleans Steamship Ass'n,* 673 F.2d 742, 750-51 (5th Cir.1982) (rights under Title VII cannot be bargained away; the fact that a contract limits employment opportunities is no justification if the result is discriminating) (citations omitted), *cert. denied,* 460 U.S. 1038, 103 S.Ct. 1428, 75 L.Ed.2d 789 (1983).

The contractual nature of the hiring preference does not negate whatever disparate effect it may have. Rather, the university's interests in the contract in this regard are adequately accounted for in determining the business necessity for entering the contract and granting the resulting hiring preference. In short, there was evidence of numerous instances of study leave occurring at the university. Granting such hiring preferences in the form of study leave to a workforce already established as racially unbalanced through prior discrimination necessarily falls more heavily on minorities who are not considered for positions filled by those favored employees. We conclude that under the facts of this case, the appellant has made a showing of a hiring preference with a disparate impact on minority applicants.[9]

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9. The appellant has argued that the university's Nonacademic Staff Handbook, which explicitly states a hiring priority for present university employees over outside applicants, also created a hiring preference amenable to disparate impact analysis. The appellees attempt to disavow any relationship between this general hiring preference and this case urging that

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III.

Although finding to the contrary, the district court assumed for purposes of analysis that the plaintiff had established a facially neutral hiring preference with disparate impact. The court then turned its attention to the defendant's burden of demonstrating business necessity. which it found because the "practice of granting leave to faculty members and administrative members to pursue advanced study serves a university's interest in getting bet-

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the Director of Federal Relations position was of a different sort than those positions covered by the Handbook. On one hand, the Handbook makes no such distinction and on its face appears to apply to all nonacademic positions. Our examination of the record reveals no significant deviation in this case from the hiring procedures set forth in the Handbook that would indicate that the Handbook policy does not apply to the Director position. On the other hand, there is no affirmative evidence in the record indicating that the Board recognized and considered this general policy in filling the Director's position. A fair reading of the lower court's opinion indicates that it found that the university acted *solely* because of its contractual obligation to Williams, and that finding would implicitly negate the appellant's attempt to bring this case under the operation of the general Handbook policy. The question of whether the Board acted pursuant to Williams' contractual preference, or pursuant to the general Handbook preference, or both, in filling the Director position is a finding of fact that may not be overturned unless clearly erroneous. Fed.R.Civ.P. 52(a). In light of the policy's seemingly clear application to all nonacademic positions, we might well have reached the conclusion that the general policy was a factor in the Board's actions were we afforded the opportunity for independent review. Under the clearly erroneous standard, however, the district court's conclusion is "plausible" based upon the record as a whole, and we are therefore bound by its finding. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518, 528 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 72 L.Ed.2d 66, 79 (1982).

ter qualified personnel." Rec. at 105. The court opined that the logical conclusion of the appellant's argument was that ASU could never maintain a study leave policy, for any obligation to rehire former employees would perpetuate the prior system found to be discriminatory under *Craig*. The court observed that to find in the appellant's favor would undermine one of the functions of a university—to provide its students with well-trained faculty. And finally, the court concluded that there had been no showing that an inordinate number of vacancies were filled with faculty members returning from study leave; therefore, other vacancies existed for hiring pursuant to the requisites of *Craig*.

[3]The former Fifth Circuit in numerous decisions still binding in this circuit[10] has set forth standards to be followed in considering whether business necessity has been sufficiently established in a given case.

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced or accomplish it equally well with lesser differential racial impact.

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10. Decisions of the former Fifth Circuit rendered prior to October 1, 1981, are binding precedent in this circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 245 (5th Cir.1974), *citing Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971). *Accord Crawford v. Western Electric Co.*, 745 F.2d 1373, 1385 (11th Cir.1984); *Jackson v. Seaboard Coast Line Rd. Co.*, 678 F.2d 992, 1016 (11th Cir.1982). To sustain scrutiny, a practice with discriminatory impact must "not only *foster* safety and efficiency, but must be *essential* to that goal." *Pettway*, 494 F.2d at 244 n. 87, *citing United States v. St. Louis San Francisco Railway Co.*, 464 F.2d 301, 308 (8th Cir.1972) (en banc) (citations omitted), *cert. denied*, 409 U.S. 1116, 93 S.Ct. 913, 34 L.Ed.2d 700 (1973). *Accord Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1389 (5th Cir.1978), *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979). The business necessity doctrine is "very narrow," *Parson*, 575 F.2d at 1389, and the employer bears the burden of not only articulating but also *proving* business necessity through the evidence. *See Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750, 752 (5th Cir.1981), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). Having carefully reviewed the record, we find that the appellees have not carried their burden of establishing business necessity.

[4] First and foremost, we find absolutely no *evidence* adduced at trial to support the conclusion that a study leave policy with resulting hiring preference is necessary to promote a more qualified staff. There simply was no testimony presented at trial addressing any need or justification for a study leave policy, or even explaining why a university such as ASU would be compelled to utilize

such a policy. Rather, as the appellant urges, it appears that the district court made its finding of business necessity based upon a common sense notion that more education would necessarily improve the staff of the university. But it must be remembered that the prior discriminatory practices of ASU have created an artificially narrow workforce at the university based upon race, rather than based upon pure qualifications to perform a particular job. That racially constricted workforce, existing in a vacuum, would undoubtedly be enhanced through further education. It can be argued, however, that the university might better achieve its goal of improving its workforce by opening up all hiring decisions for vacant positions to the widest range of qualified persons possible, rather than resorting to promotion through educational incentives from within its own racially skewed workforce. As the appellant observes, there is no basis in this record to conclude that the educational leave policy would have been needed if the university had simply allowed all applicants, including the now-accessible pool of white applicants, to compete equally with current employees for future vacancies.

This reasoning is supported by what transpired in this case. Jacqueline Williams received a study leave agreement entitling her to two years partial salary to pursue her doctorate degree. Upon her return from the leave, she was placed into the Director of Federal Relations position without consideration of any other of the persons who had applied for the position. The evidence at trial indicated

that she received approximately $6,000 salary per year more than the highest rated salary at which the position was advertised. The position only called for a Masters' Degree,[11] which she possessed prior to taking her study leave, and the evidence at trial established that her course of study bore no particular relationship to the duties to be carried out in the federal relations position.[12] Although she was found "qualified" by the district court in the sense of possessing minimal qualifications for the position (as was the appellant), even the appellees' own expert witness rated Williams as the fifth highest qualified applicant behind four others.[13] In short, it is simply conjecture to contend that the leave policy in the instant case resulted in improvement of the university's administrative staff, as

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11. *See* Plaintiff's Exhibit No. 12 (advertisement in *The Chronicle of Higher Education*).

12. *See* Rec. at 149; 236-243. Williams' graduate course work was in Higher Education Administration. Although she had completed her coursework, she had not completed her dissertation at the time she returned to ASU, and therefore had not received her degree. Rec. at 272. Furthermore, much of the testimony concerning Williams' knowledge of obtaining grant monies came from exposure she had to grant proposals while working as Dr. Watkins' assistant, *prior* to leaving for study leave. Rec. at 248-50; 276-80; 305-06.

13. This witness, ASU's former Director of Federal Relations Isaac Sanders, ranked no applicants below Williams, and therefore he did not rank Moore in relation to Williams. Rec. at 313-14. In contrast, Dr. Randolph testified that he felt Moore was more qualified for the position than Williams, Rec. at 50, as did Dr. Gary Smith, the head of the search committee that never met. Rec. at 148. Dr. Carl Grafton, professor of political government at Auburn University at Montgomery, testified that Moore's masters in political science "very much" qualified her for a grantsman position such as here. Rec. at 163-64.

completion of the aborted search progress may well have resulted in employment of a more-qualified applicant at a lower salary.[14]

We reiterate that this case simply involves a failure on the part of the university to bear its burden of establishing business necessity for the hiring preference granted its existing employee. That the university did not carry its burden in this case does not, as the appellee contends, mandate the conclusion that ASU could never employ a study leave program. The policy involved here concerned leave for a member of the administrative staff, rather than for a member of the faculty. The terms under which the leave was granted included that the employee could return

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14. The appellees contend that because Moore was not among the top five applicants, she would not have received the appointment even if the selection process had remained open, and that therefore she has no claim. They rely on *Hereford v. Huntsville*, 574 F.2d 268 (5th Cir.1978). *Hereford*, however, was a disparate treatment case and the evidence of qualifications was relevant to the question of the employer's motives in making the challenged promotions. *See also McCarthney v. Griffin-Spalding County Bd. of Education*, 791 F.2d 1549, 1552 (11th Cir.1986). Motive is irrelevant, however, in a disparate impact case, *Griggs*, 401 U.S. at 430, 91 S.Ct. at 853, 28 L.Ed.2d at 163, and a plaintiff in a disparate impact case "need not prove . . . that he would have been the most qualified individual for the jobs. . . ." *Hung Ping Wang v. Hoffman*, 694 F.2d 1146, 1148 (9th Cir.1982), *citing, Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 240-245 (5th Cir.1974), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979). At any rate, the appellees make factual assumptions not evident on this record. In short, there was conflicting evidence as to the relative qualifications of Moore and Williams, and even if there were applicants more qualified than either of them, there was also testimony at trial that many applicants offered jobs decline employment. Therefore, there is no factual basis upon which to conclude that Moore could not have received the appointment.

to a "mutually acceptable" position, which could mean virtually anything. Significantly, the policy was devoid of any mention of return to a specific position, nor was the preference tied to a requirement that the course of study pursued while the employee was on leave in some way bear a particular relation to the requirements of the job being applied for. There are any number of variables that might be accounted for in considering the necessity for a particular study leave policy, which individually or in combination could make the resulting hiring preference justifiable or at least more palatable. But the study leave policy invoked here was nothing more than a blanket preference instituted regardless of the employee's qualifications for the position or the qualifications of other applicants for the position. The defendant has not shown such a preference to be justified by business necessity.[15]

IV.

Having concluded that ASU failed to demonstrate job-relatedness or business necessity, we need not examine whether alternatives existed which would serve the em-

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15. We also reject the district court's reasoning that because there had been no showing that an "inordinate" number of vacancies were filled through study leave, other vacancies existed for hiring pursuant to *Craig*. This is the type of argument rejected in *Connecticut v. Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982), where the Court concluded that the "bottom-line" would not excuse employment opportunities lost by individual minority members.

ployer's needs with lesser impact or whether the practice was a pretext for discrimination. *See Walker,* 726 F.2d at 1559. Accordingly, the district court's judgment is REVERSED and we REMAND to that court for determination of the proper relief.

REVERSED and REMANDED